FILE COPY

No. 464

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

FEDERAL TRADE COMMISSION,
Petitioner,
vs.
MORTON SALT COMPANY,
Respondent.

On Petition for Certiorari,

BRIEF OF RESPONDENT OPPOSING CERTIORARI.

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STATEMENT OF THE CASE.

Petitioner in its petition and brief has correctly cited the case below, it has properly indicated the basis of jurisdiction, and it has correctly cited and quoted the sections of the Clayton Act, as amended by the Robinson-Patman Act, which are involved in this case.

However, in its statement of the case, Petitioner, instead of making a clear and concise statement of the facts involved, has chosen to supply this Court with only a condensed version of certain selected "findings of fact" replete with its own adjective coloration. Briefly, the basic facts are as follows (R. 2115-2117):

1. A carload discount is granted on all orders moving as a part of a carload shipment (whether in straight cars to a given customer or as a part of a pool car to several customers). This amounts to 10¢ a case on the Blue Label package and to approximately 5% of the f.o.b. plant price

on all other table salt items. Except for one instance of reshipment out of a warehouse (R. 330), every single witness enjoyed the carload discount (R. 1300-1302). Moreover, of Respondent's total table salt business for the entire country, only 1/10 of 1% moved in less than carload lots (Resp. Ex. 17), and this fractional percentage is accounted for entirely by reshipments, for the customer's convenience, out of metropolitan warehouses to destinations beyond the area served by the warehouse (R. 282-4). (Note: the exhibits in this case have not been made a part of the record, so, of necessity, occasional reference must be made to the exhibits rather than to the record).

2. To any customer purchasing 5,000 or more cases of Blue Label salt in any consecutive twelve-month period, a discount of 10¢ per case is allowed. This is in addition to the carload discount where applicable. The carload price of the Blue Label is $1.50 per case and the less than carload price is $1.60 per case.

3. To any customer purchasing 50,000 or more cases of Blue Label salt in any consecutive twelve-month period, a discount of 15¢ per case is allowed. This is in addition to the carload discount where applicable, but it includes the 10¢ noted in item 2 above.

4. To any customer purchasing $50,000 or more of table salt in any consecutive twelve-month period, a discount of approximately 5% of the f.o.b. plant price is granted. This is in addition to the carload discount where applicable, but it is not paid on the Blue Label, although the purchases of Blue Label are included in the computation of the $50,000 qualification requirement.

5. These are all standard quantity discounts, open and available to all customers of every class and description. The carload discount has been in effect since 1922, the

5,000 and 50,000 case discounts since 1927 or 1928, and the $50,000 discount since 1933 or 1934.

6. In addition to the standard quantity discounts described above, the case collaterally involved a few instances where competitive adjustments were allowed.

Reasons for Denying the Petition.

1. **Jurisdiction:** Rule 38 of this Court, as revised February 27, 1939, specifies the precise procedure to be followed by any petitioner seeking review on a writ of certiorari. Among other things, the petitioner must serve respondent, within ten days after the filing of the petition, with a copy of the petition, a copy of the printed record and a copy of any brief filed in support of the petition. In this case, Petitioner has completely ignored this rule. The petition was docketed on December 2, 1947; Respondent received service of the petition and brief in support, not on December 12, 1947 when it was due, but on December 15, 1947; and Respondent did not receive service of a copy of the record until December 18, 1947, six days after service was due. Accordingly, the petition should be dismissed for want of jurisdiction because of Petitioner's failure to comply with Rule 38.

2. **The Merits:** Petitioner is jousting with a theoretical windmill, and seeks to invoke the attention of this Court as an umpire of issues which do not exist and were not decided in this case:

A. Rule 38 of this Court provides that only questions specifically raised by the petitioner will be considered, so we take Petitioner's "Questions Presented" (Pet. Br. 2) at their face value. The first, and the one on which Petitioner labors the most, in effect, is whether or not the Federal Trade Commission in quantity discount cases under

Section 2 of the Clayton Act, must assume the burden of proving that those quantity discounts do not merely reflect cost savings.

In the first place, cost savings was not an issue before the Circuit Court of Appeals. Respondent introduced cost evidence during the hearings, which was stricken, with no attempt being made to reinstate it. This was acknowledged by the Commission in its own modified findings of fact (R. 2089). Nor was the issue of the existence of cost savings raised or argued by the Respondent or the Petitioner before the Court below. Consequently, the Court below could not and did not decide anything about the question of where the burden of proving cost savings lies. In fact, the phrase "burden of proof" was not even employed in the lower Court's opinion with respect to cost savings.

What was at issue was whether or not standard quantity discounts, openly available to all, were discriminatory within the meaning of the Act. Respondent asserted that, although standard quantity discounts obviously produced *differentials*, the discounts were, nevertheless, not *discriminatory* because they were equally available to all on equal terms. The Act condemns *discriminations*, not *differentials*. Petitioner argued that discrimination results simply from the existence of differentials, and sought to reinforce this argument by reference to the first proviso clause in Section 2(a), which simply says that the Act shall not be deemed to condemn any *differential*, regardless of whether or not it is discriminatory or injures competition, if adequate cost savings are established. Thus, the Commission did not prove or attempt to prove that the Respondent discriminated by offering its standard discounts to some but not to others: Rather it tried to argue that because no cost savings were established, the differentials of the quantity discounts were *per se* discriminatory

The Court below properly held (R. 2122-2124) that this legal theorizing was fallacious. In effect, the Court ruled as follows:

(a) If, as here, quantity discounts produce differentials, then proof of cost savings take those differentials completely out of the Act (R. 2118, 3rd par.). (Thus, under such circumstances, the Respondent automatically succeeds, and evidence regarding discrimination and injury is immaterial).

(b) But if, as here, there is no evidence regarding cost savings, the Respondent still succeeds unless there is proof of both discrimination and injury. (The Commission admits that these two burdens of proof are on it. Pet. Br. 11,15).

(c) Differentials are not synonymous with discrimination (R. 2119). (Thus proof of differentials does not amount to proof of discrimination).

(d) Differentials do not become discriminations simply because cost savings were not proved, because "cost savings" are a justification which the Respondent need prove only if proof of discrimination and injury is first established by the Commission (R. 2123).

In short, the question of who has the burden of proving cost savings was never in issue, nor did the Court below make any comment regarding that burden. It merely held that the absence of cost savings evidence would not permit the Commission to convert differentials into discriminations. It had to prove that discrimination actually occurred, and the absence of cost savings proof could give rise to no presumptions which could be substituted for actual proof of discrimination.

B. The second question presented (Pet. Br. 2) is whether or not the Commission's findings that "Respondent's price

discriminations may be substantially to impair, injure or destroy competition is supported by substantial evidence". Petitioner's very statement of the question shows that an issue on this score exists only if three elements are present.

First, the statement of the question assumes that Respondent's quantity discounts amount to prohibited discriminations. But for all the reasons already indicated, it is entirely clear that the Commission failed to prove even this basic requirement of a violation. Therefore, the issue of injury is entirely academic.

Second, the Commission must have made adequate findings of injury before the problem of evidence supporting those findings is even reached. As outlined by the Petitioner (Pet. Br. 5-8), this Court is in a position quickly to ascertain that no such findings exist. In summarizing what it deems to be important findings, the Commission mixes a lot of "discrimination" language with a very small quantity of "injury" language. As to the latter, there are statements that chains are enabled to sell to the public at lower prices than wholesalers can sell to retailers (Pet. Br. 6), that discount customers have a substantial selling advantage over non-discount customers (Pet. Br. 7), that the latter either reduced their profits or increased their prices and lost business (Pet. Br. 7), that the discounts were particularly harmful to competition between chains and other retailers (Pet. Br. 7), and that the effect of the discounts may be substantially to lessen competition (Pet. Br. 7). But these are not findings. They are sweeping generalaties They purport to be predicated on past events testified to in the record, but they are utterly lacking in either specific reference or general allusion to any evidence of where, when, how, to what extent, with what frequency or in-

tensity, or even to whom these alleged injurious events took place. General statements embodying the word "injury" do not, by the mere recital of that statutory word, however frequent, become findings of the existence or probability of injury. And if an order lacks proper findings in support of it, then the order fails.

Third, there must be substantial evidence of injury. Contrary to the charge made by the Petitioner, the Court below did not weigh "conflicting evidence". The Circuit Court of Appeals merely held (R. 212-2) that proof of loss of business between competitors due to different resale prices by those competitors, does not prove injury by Respondent's discounts. In other words, competition is largely a process of one competitor "injuring" another competitor by attracting business with lower prices or special or different services. This exists, as it must under a competitive situation, regardless of whether or not Respondent grants discounts. Therefore, those resale price differentials prove nothing in this case except the existence of normal competition, unless directly and carefully related to Respondent's discounts. This the Commission failed to do. Moreover, the Court below took into account that which the Commission has consistently ignored (R. 2121-2): (a) Not one discount customer reflected the discount in his resale price; and (b) during the entire period covered by this case, and in all trade areas covered by this case, there were substantial increases in sales of Respondent's products to non-discount customers (Resp. Ex. 7(a) to 15(b)). In brief, the Commission proved, not injury from Respondent's discounts but the existence of normal competition, and it is now complaining to this Court because the Circuit Court of Appeals refused to indulge in the Commission's hoped-for "presumptions", "inferences" and "conclusions".

C. Little comment need be made as to the third question presented. The court below (R. 2125) held that the order of the Commission was too sweeping. It required Respondent to conduct its business at its peril. To this the Commission replies (Pet. Br. 17) that the order is clear and specific. But again this is not the issue. Granted, the order is clear and specific, but the order is void because it clearly and specifically, but none-the-less sweepingly, enjoins Respondent from violating Section 2 of the Clayton Act. This the Commission cannot do: *National Labor Relations Board v. Express Pub. Co.*, 312 U. S. 426, 435, 437, 61 S. Ct. 693, 699, 700.

CONCLUSION.

There were only two issues in this case. Are Respondent's standard quantity discounts, offered equally and openly over a long period of time to all customers, discriminatory and injurious? The burden on both issues was on the Commission and it failed on both. Yet, seeking to condemn Respondent's sales program, which would in turn condemn similar programs used in almost every competitive business in the country, the Commission seeks to enlist the assistance of this Court, not on the true issues, but on three wholly mythical issues. In this the Commission should not succeed, so the petition for certiorari should be denied.

Respectfully submitted,

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